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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.157 OF 2007

Sai Trading Company — Applicant
versus
Sangli Miraj and Kupwad City Municipal Corpn. & others — Respondents

WITH
WRIT PETITION NO.3074 OF 2007

Sai Trading Company — Petitioner
versus
Sangli Miraj and Kupwad City Municipal Corpn. and others — Respondents

Shri Virendra Tulzapurkar, Sr.Advocate with Shri G.S.Godbole appearing for applicant in Revision Application and petitioner in writ petitions.

Shri N.V.Walawalkar, Sr.Advocate along with Shri Sudhir Prabhu for respondents Corporation.

Shri A.M.Kulkarni for respondent no.2.

CORAM : A.S.OKA, J.

DATE : 24th April 2007

JUDGMENET :-

1. The submissions of the learned advocates appearing for the parties were heard on the last date. The Civil Revision Application takes an exception to the judgement and order dated 4th

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April 2007 passed by the learned Principal District Judge, Sangli by which an order dated 14th March 2007 passed by the Arbitral Tribunal has been set aside. The order of Arbitral Tribunal was passed under section 17 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the said Act of 1996").

2. On 27th April 2006 the first respondent Municipal Corporation executed an Agreement by which the revision applicant was appointed as a contractor for collection of Octroi for and on behalf of first respondent for the period commencing from 1st May 2006 and ending with 30th April 2007. The bid offered by the revision applicant was in the sum of Rs.43,06,66,666/-.

3. The said amount was to be paid by the revision applicant to the first respondent in the manner provided in the agreement executed by and between the parties. The agreement provided that the revision applicant shall be entitled to retain with him as and by way of commission from out of the amount of Octroi collected by him during the period of contract only that much amount which exceeds the amount quoted by him in

his offer as and by way of contract amount. The contract further provides that the entire amount of daily Octroi collected by the revision applicant shall be remitted daily by him until 2% of the total contract amount is paid per week. If the total of daily collection during any week is less than the 2% of the contract amount, the revision applicant was to ensure that at the end of the week the 2% of the contract amount is paid to the first respondent Corporation irrespective of the shortfall in collection during the same week. Therefore, in substance, for a period of first fifty weeks, the revision applicant was to pay 2% of the contract amount per week to the first respondent. It is not in dispute between the parties that the period of fifty weeks has expired on 14th April 2007.

4. According to the case of the revision applicant, from 1st May 2006 till 8th May 2006 various organisations of the Traders at Sangli called for an indefinite strike which hampered the collection of octroi. According to the revision applicant, there were various natural calamities like floods in the months of July and August 2006 which also hampered collection of octroi.

5. According to the case of the first respondent, the revision applicant was in arrears of a sum of Rs.2,61,96,255/-. A Resolution was passed by the General Body of the first respondent on 15th February 2007 by which it was resolved that for deciding the dispute as regards recovery of the sum of Rs.2,61,96,255/-, a recourse should be taken to Arbitration. Acting on the said resolution, the revision applicant and the first respondent appointed their own Arbitrators. The said two arbitrators appointed the Presiding Arbitrator. The Arbitral Tribunal passed an order dated 17th March 2007 purporting to be an order under section 17 of the said Act of 1996. The relevant part of the said order reads thus :-

> "We therefore make the following order.
>
> i) The respondent, The Sangli, Miraj & Kupwad Municipal Corporation shall not demand or recover from the claimants the sum of Rs.2,61,96,255/- by enforcing the bank guarantee for Rs.4,25,00,000/- or otherwise.
>
> ii) The claimant shall continue to deposit with the respondent, not the contractual amount but the actual amount of octroi duty being collected every week right upto 15th April 2007.
>
> iii) The minutes of today’s meeting will

be sent to the parties and Counsel separately.

iv) The parties are at liberty to apply for variation of this order.

6. An appeal was preferred under section 37 of the said Act of 1996 by the first respondent before the Principal District Judge. By the judgment and order dated 4th April 2007 which has been impugned in the Revision, the said appeal has been allowed by the setting aside the order dated 14th March 2007 passed by the Arbitral Tribunal. During pendency of the said appeal, the second to fifth respondents in the Civil Revision Application filed an application at Exhibit-60. The prayer in the said application was that the said respondents be permitted to intervene and to make submissions. The said application was allowed on 22nd March 2007 by the learned Principal District Judge, Sangli by directing that the second to fifth respondents shall be allowed to place on record their opinion by way of arguments by impleading them as parties to the proceedings. Writ Petition No.3074 of 2007 has been filed by the revision applicant for challenging the said order.

7. The learned senior counsel appearing for the

revision applicant has invited my attention to various documents on record. He pointed out that a statement of claim has been filed by the revision applicant before the Arbitral Tribunal raising a larger claim which is much more than a sum of Rs.2,61,96,255/-. He invited my attention to certain documents placed on record before the Arbitral Tribunal. He pointed out that by a General Body Resolution dated 18th March 2006 the escort fee was enhanced. However, on 6th May 2006 the first respondent unilaterally decided not to enforce the resolution. He invited my attention to letter dated 6th February 2007 submitted by the Commissioner of the first respondent to the State Government.

8. The learned senior counsel for revision applicant submitted that even in the said letter the Commissioner of the first respondent has noted that due to agitation of the Merchants as well as due to floods, the recovery of octroi was affected and a sum of Rs.8.42 crores was paid by the revision applicant from his own resources. He invited my attention to a paragraph in the said letter which records that a sum of Rs.2,61,96,255/- can be recovered from the bank guarantee furnished by the revision applicant and

even if some default has been committed by the revision applicant, it is not in the interests of the first respondent to discontinue the contract. The submission of the learned senior counsel appearing for the revision applicant is that even the first respondent has accepted that the recovery of the octroi was severely affected as a result of the agitation and flood situation and, therefore, the Arbitral Tribunal was justified in directing the first respondent not to recover the amount of Rs.2,61,96,255/- by invoking the bank guarantee of Rs.4.25 crores furnished by the revision applicant. He submitted that the Arbitral Tribunal was well within its powers to restrain the first respondent from encashing the bank guarantee as the encashment of bank guarantee would result in irreparable harm or injustice to the revision applicant. He submitted that the reference to arbitration was made to decide whether the revision applicant was liable to pay the said amount of Rs.2,61,96,255/- and therefore, interim direction given under section 17 of the said Act of 1996 was fully justified.

9. The learned senior counsel for the revision applicant submitted that the second direction

given was to deposit the actual amount of octroi recovered by the revision applicant up to 15th April 2007 and there was no prejudice to the first respondent by the said direction. Another contention has been raised in the petition to the effect that the appeal ought to have been filed in the Court of the Civil Judge, Senior Division, at Sangli being the principal Court of original jurisdiction. However, the learned senior counsel appearing for the revision applicant fairly stated that in view of the recent decision of the Full Bench of this Court pronounced on 12th April 2007 in the case of M/s.Fountain Head Developr V/s. Mrs.Maria A. Sequeira (since deceased by LRs), the District Court was the proper Court to entertain the appeal. He, however, submitted that the revision applicant will agitate the said contention before the appropriate forum and it should not be construed that the said contention has been given up by the revision applicant.

10. He invited my attention to the order dated 22nd March 2007 and submitted that the second to fifth respondents in the revision application could not have been allowed to place on record their opinion by way of their arguments as the

dispute between the revision applicant and the first respondent is purely a contractual dispute. He submitted that second to fifth respondents were neither necessary nor proper parties to the appeal.

11. Learned counsel for the second to fifth respondents submitted that the order has been passed under the provisions of Rule 8A of Order-I of Code of Civil Procedure, 1908 and the Court was justified in passing the said order.

12. The submission of the senior counsel appearing for the revision applicant was that if the order in favour of second to fifth respondent is erroneous, the order passed in the appeal becomes illegal as the said order has been passed on the basis of the submissions made by the second to firth respondents.

13. I have considered the submissions. It will be necessary to refer to certain terms of the contract between the parties. Clause No.7 of the said contract reads thus :-

> "The agent shall not be entitled to any compensation, rebate or reduction in the

amount quoted by the agent in his offer whatsoever **on the account that there is closure of the market or the strike by the merchants or riots or natural calamity or any other such reasons or decrease in intensity or potentiality or business or collection of Octroi any reason whatsoever."** (Emphasis added)

It will also be necessary to refer to clause no.3 of the contract which reads thus :-

"3) In consideration of the agent having agreed to collect during the subsistence of this agreement, the Agent shall be entitled to retain with him as and by way of commission, from out of amount of Octroi collected by him during period of contract only that much amount which exceeds the amount quoted by him in his offer as and by way of contract amount.

Provided that the entire amount of daily Octroi collected (i.e. daily collection) by the Agent be remitted daily by him until of 2% of the total contract amount is paid. If the total of daily collection during any week is less than the 2% of the contract amount, the agent shall ensure at the end of the week that fall amount of 2% of the contract amount. In other words it shall be binding on the agent to see that 2% of the contract amount is paid every week end to the Corporation, irrespective of shortfall during that week. The agent shall be entitled to retain with him as his commission the amount is excess of the said collected by him during any week.

Provided further that the Agent shall, during the period of contract, continue to remit to the Corporation as aforesaid Octroi collected by him till such remission by him equals to contract amount. Thereafter only, the Octroi shall be collected by him. If during the

> period of contract the Octroi collected falls short of contract amount quoted by the agent in his offer then the agent shall not be entitled to receive from the Corporation any amount as and by way of his commission. **On the other hand, if in any week the amount of Octroi collected by agent falls short of the amount specified above, then the agent shall forthwith remit to the Corporation, alongwith the amount of Octroi collected by him, the shortfall in the collection of Octroi relating to that week so as to make the amount of collection of Octroi in that week equal to the amount of the 2% of the total contract amount."** (Emphasis added).

14. Thus, under the contract, the revision applicant was liable to pay the said amount of Rs.2,61,96,255/- as the said amount represents the shortfall in 2% of the contract amount payable by the applicant per week. The case of the revision applicant was that he was not liable to pay the said amount on account of lesser recovery of octroi due to agitation of merchants and/or natural calamity etc.. When admittedly a sum of Rs.2,61,96,255/- was due and payable as per the contract, the Arbitral Tribunal could not have prevented recovery of the said amount by encashing the bank guarantee especially in the light of clause-7 of the agreement between the parties. If the Arbitral Tribunal was of the view that the applicant was entitled to some concession, appropriate final award could have

been passed. The second direction given under the impugned order by the Arbitral Tribunal was for permitting the applicant to deposit the actual amount of octroi recovered in every week. Prima facie, the payment of the said amount was not the subject matter of the dispute before the Arbitral Tribunal. The reference to the Arbitration was confined to alleged dispute regarding over-due amount of Rs.2,61,96,255/- and the Arbitral Tribunal was not concerned with the weekly payment required to be made by the applicant. In any event, under the agreement, the revision applicant was under an obligation to deposit 2% of the contract amount every week for first 50 weeks irrespective of actual collection of Octroi. Considering this aspect, the learned Principal District Judge, Sangli has observed that the order passed by the Arbitral Tribunal was uncalled for and was contrary to the express terms of the contract. After recording a finding to this effect, the learned Principal District Judge has rightly set aside the order passed by the Arbitral Tribunal.

15. A perusal of the order of the learned Principal District Judge shows that the said order is not based on the submissions made by the

second to fifth respondents and in fact after considering the merits and demerits of the order passed by the Arbitral Tribunal, the learned Principal District Judge came to the conclusion that the order deserves to be set aside. I find no error in the view taken by the learned Principal District Judge as the view is based on sound principles of law as well as the relevant clauses in the agreement which were admittedly binding on the parties. Therefore, the final order passed by the learned Principal District Judge on 4th April 2007 deserves to be confirmed and revision application deserves to be rejected.

16. Insofar as submissions made by the learned senior counsel appearing for the revision applicant on order dated 22nd March 2007 are concerned, it must be noted here that there is no specific finding recorded in the said order that the second to fifth respondents were either necessary or proper parties. The learned Principal District Judge appears to have invoked Rule 8A of Order I of the said Code of 1908. As the final order passed in the appeal is being confirmed on its own merits, it is not necessary to deal with the submissions made by the learned senior counsel appearing for the revision

applicant on legality and validity of the order dated 22nd March 2007. It must be, however, noted here that no finding has been recorded in this order as regards the merits of the order dated 22nd March 2007 inasmuch as the challenge to the said order has become academic. It will always be open for the revision applicant to raise all the contentions which are raised in the Writ Petition No.3047 of 2007 in the pending proceedings as well as in any other proceedings which may be filed by the parties.

17. Hence, I pass following order :-

(a) Civil Revision Application No.157 of 2007is rejected with no orders as to costs;

(b) In view of what is observed above, Writ Petition No.3074 of 2007 stands disposed of subject to the observations made in the last paragraph above.

18. At this stage, a prayer is made by the counsel for the revision applicant to continue the order dated 9th April 2007 below Exhibit-50 by the District Court for a reasonable time. The said request is opposed by the learned counsel

for the first respondent. Considering the fact that a copy of this order will not be immediately available, for the time being, the said order below Exhibit-50 will continue to operate for a period of three weeks from today. If copy of present order is not made available by 3rd May 2007, liberty to the revision applicant to move this Court for further extension. It is obvious that till the time the said protection continues, the revision applicant will keep alive the existing bank guarantee.

(A.S.OKA, J.)